Supreme Court, U.S.
FILED
DEC 19 1979
MICHAEL RODAK, JR., CLERK

No. 79-598

In the Supreme Court of the United States

OCTOBER TERM, 1979

MURRAY H. MICHAEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a3) is not reported. The opinion of the district court on the sufficiency of the indictment is reported at 456 F. Supp. 335.

JURISDICTION

The judgment of the court of appeals (Pet. App. a4) was entered on August 17, 1979. A petition for rehearing was denied on September 12, 1979. The petition for a writ of certiorari was filed on October 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS REPRESENTED

1. Whether, in a prosecution for aiding and abetting the misapplication of bank funds, the instructions permitted the jury to convict petitioner on the erroneous theory that he had directly violated 18 U.S.C. 656 while acting as a bank officer.

2. Whether the concurrent sentence doctrine was properly invoked by the court of appeals.

3. Whether the conspiracy count of the indictment charged an offense.

STATEMENT

Petitioner was charged in a 17-count indictment returned in the United States District Court for the District of New Jersey with various offenses growing out of the payment of kickbacks to secure a series of bank loans (Pet. App. a9-a44). Count one charged that petitioner conspired with James M. Neveras, a former officer of the Trust Company of New Jersey, to misapply bank funds, in violation of 18 U.S.C. 371 and 656. Counts two through fourteen charged that petitioner misapplied bank funds when he secured various loans from the Trust Company of New Jersey, in violation of 18 U.S.C. 656 and 2. Counts fifteen through seventeen charged that he travelled in interstate commerce with the intent to commit bribery, in violation of 18 U.S.C. 1952 and 2. Following a jury trial, petitioner was convicted as charged.[1] He was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed (Pet. App. a1-a3).

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[1]Neveras pleaded guilty to conspiracy to misapply bank funds and testified as a government witness at trial.

1. Petitioner, a real estate developer, obtained loans from the Trust Company of New Jersey (TCNJ), an FDIC-insured bank in Jersey City, New Jersey, by paying kickbacks to Neveras, then a vice-president in the bank's commercial lending department. The money was obtained ostensibly to finish construction on a partially completed motel in Orlando, Florida (Tr. 4.26-4.28), and it was given to petitioner without the investigation that sound banking practices dictate (Tr. 2.6-2.8).

In January 1974, Neveras first arranged and approved an unsecured $100,000 loan from TCNJ to petitioner (Tr. 1.195), in exchange for which he received a $10,000 kickback from petitioner (Tr. 1.199, 2.6). In April 1974, petitioner again paid a $10,000 kickback to Neveras in exchange for his approval of a $100,000 loan to a corporation controlled by petitioner (Tr. 2.88-2.92). Later that month petitioner paid another $10,000 kickback in exchange for a third $100,000 loan (Tr. 2,100-2.104).

In October 1974, when payments became delinquent on all three loans (Tr. 2.107), two more unsecured loans were issued to "dummy" corporations controlled by petitioner, and funds from these loans were used to make payments on the first three loans (Tr. 2.107-2.108, 2.115-2.116). Thereafter, throughout 1975 and the first seven months of 1976, other new loans were approved by Neveras in order to assist petitioner in repaying previous loans and to finance other projects of petitioner (Tr. 2.119-2.164).

In all, petitioner obtained $833,000 in loans and was unable to repay $593,000 in principal. He converted more than $250,000 of the loans received to cash (Tr. 5.17-5.18, 5.124, 5.125).

ARGUMENT

1. Petitioner contends that, although he was not a bank officer, the trial court permitted the jury to convict him on counts two through fourteen on a factual finding that he was a bank officer who misapplied funds of the bank, in violation of 18 U.S.C. 656. This contention lacks merit.

The statute, 18 U.S.C. 656, proscribes misapplication of bank funds by "an officer, director, agent or employee of, or [a person who is] connected in any capacity with * * *" an insured bank. Since petitioner did not occupy any position with TCNJ, he obviously could not, on his own, violate this statute. As part of its instructions, the court charged the jury (Tr. 7.175-7.176):

> If you find that the conspiracy alleged in Count 1 has been proven, and you find that in furtherance of that conspiracy either of the co-conspirators committed one or more of the substantive crimes charged in Counts 2 through 14, then you may find the defendant, Murray H. Michael, guilty of those substantive crimes even if he did not commit them directly. This is so because a conspiracy can be viewed as a partnership in crime and each partner is responsible for the criminal acts of his co-conspirators which were committed in furtherance of the conspiracy.

This instruction, contrary to petitioner's contention, would not have led the jury to conclude that petitioner could be convicted of the substantive offenses on the theory that he was acting as a bank officer under the statute. While the instruction is inartfully phrased, it was obviously designed to inform the jury that it could convict petitioner even if he did not directly commit the

substantive offenses.[2] Significantly, nothing in the evidence suggests that petitioner acted directly to misapply the funds. Rather, the evidence of conspiracy was that petitioner paid substantial kickbacks to a bank official for loans; the natural consequence of such payments was the misapplication of bank funds by the official. There was simply no possibility that the jury, on the evidence before it, could have convicted on the hypothesis that petitioner was himself a bank officer who had misapplied the bank's funds. There was, therefore, no prejudicial error in this instruction.[3]

2. Petitioner contends that the court of appeals abused its discretion by invoking the concurrent sentence doctrine and declining to pass upon his conviction under the three Travel Act counts (Counts 15-17). Petitioner's attack on his conviction on those counts rested on his argument that the Travel Act does not proscribe

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[2]It is well settled that a defendant can be convicted of aiding and abetting in or conspiring to commit an offense that he is personally incapable of committing owing to his exclusion from the class whose conduct is proscribed by the statute. *United States* v. *Tokoph*, 514 F. 2d 597, 602 (10th Cir. 1975). See also *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-225 n.59 (1940); *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915); *United States* v. *Lester*, 363 F. 2d 68 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

[3]The cases cited by petitioner are inapposite. *United States* v. *Weitzel*, 246 U.S. 533 (1918), held only that a receiver of a bank cannot be convicted of violating Rev. Stat. 5209 (now 18 U.S.C. 656). Since the Court had no occasion to consider whether a receiver could be convicted of conspiring with others to violate the statute, it did not decide how a jury should be instructed on such a conspiracy count. *United States* v. *Tornabene*, 222 F. 2d 875 (3r Cir. 1955), held that a nonbank officer may be convicted of aiding and abetting a misapplication of bank funds only if a bank officer actually commits the substantive offense. *Tornabene* does not address the *Pinkerton* instruction about which petitioner complains.

commercial bribery. Since this Court has now held to the contrary in *Perrin* v. *United States*, No. 78-959 (Nov. 27, 1979), petitioner's attack on these convictions plainly lacks merit. It is thus immaterial whether the concurrent sentence doctrine was properly applied in this case.

3. Petitioner's final argument is that the conspiracy count (Pet. App. a9-a15) does not charge an offense because it merely tracks the language of 18 U.S.C. 656 and thus does not give a satisfactory description of the conspiratorial objective.

"A conspiracy indictment is sufficient if it sets out the essential elements of the charge and lists overt acts committed in furtherance of the conspiracy." *United States* v. *Evans*, 572 F. 2d 455, 483 (5th Cir.), cert. denied, 439 U.S. 856, 858, 870 (1978). As this Court stated in *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927): "It is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy * * *."

This standard is clearly satisfied here. Count one (Pet. App. a9-a11) charges that petitioner borrowed in excess of $800,000 from TCNJ in his own name and in the name of certain identified business entities of which he was a principal, that he conspired with Neveras to cause Neveras to willfully misapply funds and credits of the bank with intent to injure and defraud the bank in violation of 18 U.S.C. 656 and 2, that these loan proceeds were obtained by petitioner and Neveras based on "false, fictitious, and fraudulent documents and information," and that in return for approving loans

Neveras received kickbacks of approximately 10% of their face value. Finally, Count one alleges (Pet. App. a11) that petitioner and Neveras performed other acts to conceal the acts committed in furtherance of the conspiracy.

This statement of conspiratorial purpose, quite apart from the allegations of the substantive counts, sets forth the objective of willful misapplication of bank funds through loans to a named debtor (a petitioner-controlled corporation) made without regard to its financial capabilities, with an intention of looking for repayment, if at all, only from a third party (petitioner) who actually received the proceeds and to whom the bank was unwilling to grant a formal loan.[4]

In any event, it is well established that "it is not necessary that the object of [a] conspiracy be described in the detail which would be required to charge a violation of the substantive offense." *United States* v. *Evans*, *supra*, 572 F. 2d at 483. Various courts of appeals have held that an indictment using the language of 18 U.S.C. 656 is sufficient to charge the offense of bank fund misapplication. *United States* v. *Mann*, 517 F. 2d 259, 268 (5th Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Tokoph*, 514 F. 2d 597, 605-606 (10th Cir. 1975); *United States* v. *Llaca Orbiz*, 513 F. 2d

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[4]See the district court's discussion of this point in *United States* v. *Michael*, 456 F. Supp. 335, 343-346 (D.N.J. 1978).

816, 818 (1st Cir.), cert. denied, 423 U.S. 861 (1975); *United States* v. *Fortunato*, 402 F. 2d 79, 81 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1979

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[5]The cases cited by petitioner (Pet. 8) do not hold that the requirement of a conspiratorial objective is not satisfied merely by tracking the statutory language. *United States* v. *Britton*, 108 U.S. 199 (1883), is apposite only in its statement of the general proposition that "[a] conspiracy must be sufficiently charged." 108 U.S. at 205. *United States* v. *Knox Coal Company*, 347 F. 2d 33 (3d Cir.), cert. denied, 382 U.S. 904 (1965), actually supports the government's position. It held that when, as here, the conspiratorial objective is "an offense [under] another section of the Criminal Code, every element of that offense need not be set forth" in the conspiracy count. 347 F. 2d at 38.

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